AMFINANCE BHD

v.

KT STEEL SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
[CIVIL SUIT NO: [MT-1] 22-520-1999]
28 MARCH 2007

CONTRACT: *Illegality - Void contract - Equipment lease agreement - Whether a cloak to disguise money lending transaction - Whether void for non-registration - Contracts Act 1950, ss. 24, 97 - Bills of Sale Act 1950, s. 4 - Sale of Goods Act 1957, ss. 19, 20 - Banking and Financial Institutions Act 1989, s. 60*

CONTRACT: *Guarantee - Guarantors - Liability - Letter of Guarantee executed by 3 of 4 sureties - Whether void - Whether unenforceable - Contracts Act 1950, s. 97*

By a sale and purchase agreement dated 1 September 1996, the first defendant agreed to purchase some equipment ('equipment') from one M&M Greaves Machinery Atlas Works for RM2.3 million. Subsequently, by an agreement called Equipment Lease Agreement ('the Lease Agreement'), and a Letter of Guarantee executed by three of the four named guarantors – the plaintiff granted financial facilities for the purchase of the equipment and disbursed a sum of RM2.3 million to the first defendant. The first defendant then paid the seller and had the equipment installed at its factory. Following alleged breaches of the terms of the Lease Agreement, the plaintiff filed a claim against the first defendant for the repayment of the sum disbursed. The first defendant contested the claim, arguing that the Lease Agreement and the Letter of Guarantee were illegal and void in law. Before the learned judge, an issue arose as to whether the Lease Agreement was in effect a loan transaction, and consequently whether it was void for non-registration by virtue of s. 4 of the Bills of Sale Act 1950. Additionally, a question also arose as to whether the Letter of Guarantee, having been executed by only 3 of the 4 guarantors, was likewise void pursuant to s. 97 of the Contracts Act 1950.

Held (dismissing the claim):

(1) In determining whether the Lease Agreement is a lease agreement it purports to be, what matters is the substance and not the form. It is also trite that, for the lessor to lease the equipment, they must be seized with ownership thereof. (para 4)

(2) The sale and purchase agreement dated 1 September 1996 in this case was entered into by the first defendant as purchaser and M&M Greaves Machinery Atlas Works as seller, and the equipment was installed and fixed on the first defendant's premises. That being so, pursuant to ss. 19 and 20 of the Sales of Goods Act 1957, the property in and ownership of the equipment had passed to the first defendant. On record, there was no evidence to show that such ownership had been purchased by or transferred to the plaintiff. (para 4)

(3) The Lease Agreement is a sham to cloak and disguise a money lending transaction, and that being so it was illegal and void for non-registration under s. 4 of the Bills of Sale Act 1950. Further, since the loan and guarantee was granted without security, the same therefore violated s. 60 of the Banking and Financial Institutions Act 1989 ('BAFIA') and was rendered void by virtue of s. 24 of the Contracts Act 1950. (para 13)

(4) Since the Lease Agreement is an illegal transaction, it follows that the Letter of Guarantee is also tainted by illegality and is therefore unenforceable. Alternatively, the guarantee, having been executed by only three of the four sureties, is void by reason of s. 97 of the Contracts Act 1950. (para 13)

Case(s) referred to:

Len Min Kong v. United Malayan Banking Corporation Bhd & Anor Appeal [1998] 2 CLJ 879 CA ***(refd)***

Major Kassim Shariff v. Kwong Yik Finance Bhd [2001] 6 CLJ 397 HC ***(refd)***

Snook v. London & West Riding Investment Ltd [1967] 1 All ER ***(dist)***

Stoneleigh Finance Ltd v. Phillips & Ors [1965] 1 All ER ***(dist)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 60

Bills of Sale Act 1950, s. 4

Contracts Act 1950, ss. 24, 97

Sale of Goods Act 1957, ss. 19, 20

For the plaintiff - S Sagadeva (Rosdi Amir with him); M/s JS Pillay & Mohd Haaziq
For the defendants - Dr Wong Kim Fatt (S Palani Vel & Tee Yee Koon with him); M/s S Palani Aishah & Co

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy J:

[1] The sole issue for determination as agreed upon by the parties is whether the Equipment Lease Agreement dated 20 March 1997 is a lease agreement or a loan agreement and is void under the Bills of Sale Act 1950 for non-registration under s. 4 thereof.

[2] In approaching the determination of the issue aforesaid the parties have agreed to the following documents:

1. Statement of Agreed Facts – marked 'A'.
2. Statement of Issue for Determination marked 'B'.
3. Bundle of documents marked 'C'.
4. Plaintiff's witness statement marked 'PWS1'.
5. Defendant's witness statement marked 'DWS1'.

[3] It is only appropriate to relate to the factual matrix and sequence of events as borne out by the bundle of documents and the respective witness statement of the parties in the determination of the issue aforesaid.

1. The equipment in question is one used bar and section cross country hot rolling mill (hereinafter called 'the Equipment') installed at the first defendant's steel factory in Kota Tinggi.
2. The first defendant purchased the Equipment from M & M Greaves Machinery Atlas Works pursuant to a contract of sale agreement dated 1 September 1996 – see pp 1 to 13 of Bundle C. The purchase price and the terms of payment was as expressly stated therein.

3. On 27 September 1996 the first defendant applied to the plaintiff for financing facilities which was approved by the plaintiff through the letter of offer dated 12 October 1996 – see pp. 18 to 23 Bundle C.

4. On 20 March 1997 the first defendant and the plaintiff executed the document in the form of and under the heading of an Equipment Lease Agreement which incorporates the terms of the letter of offer dated 12 October 1996 and other additional express terms – see pp. 42 to 59 Bundle C.

5. On 20 March 1997 the second, third and fourth defendants executed the guarantee document – see pp. 60 to 63 Bundle C without the due execution of R. Gerage a/l Ramasamy whose name was expressly stated as a guarantor but duly witnessed by the plaintiff.

[4] Upon evaluating the evidence as adduced by the parties respective witness statement and the bundle of documents it is my judgment that the plaintiff's have on a balance of probabilities failed to prove their claim against the defendants for the reasons hereinafter appearing:

1. The Sale and Purchase Agreement dated 1 September 1996 was entered into by the first defendant as purchaser and M&M Greaves Machinery Atlas Works as seller. The Equipment in question was installed and fixed on the first defendant's premises. Under s. 19 and 20 of the Sales of Goods Act 1957 the property in and the ownership of the Equipment had passed to the first defendant. There is no evidence on record to show that the ownership of the Equipment was purchased or transferred to or belonged to the plaintiff. It is pertinent to note that in the agreement dated 20 March 1997 between the plaintiff and the first defendant under the form and heading of Equipment Lease Agreement the plaintiff expressly covenanted that the "Lessor has agreed to purchase/has purchased the Equipment" and hence the plaintiff to my mind has the onus of proving that they have assumed the ownership of the Equipment through documentary evidence which onus the plaintiff have failed to discharge. It is trite that in determining whether the lease agreement is a lease agreement what matters most is the substance and not the form and it is also trite that for a lessor to lease the equipment they must be seised with ownership which the evidence herein is lacking.

2. It is also my finding that the full sum of RM2.3 million was disbursed to the first defendant on the same date as the execution of the Equipment Lease Agreement as 20 March 1997 and was paid directly to the first defendant and not directly to the seller of the Equipment as evidenced by p. 69 of Bundle C. The seller M & M Greaves issued the invoice in the name of the first defendant and not the plaintiff – see p. 96 of Bundle C – thus to my mind is clear contravention of cl. 16(a) of the letter of offer.

3. It is also pertinent to note that the plaintiff covenanted in cl. 16(b) of the letter of offer that there would be reimbursement of any monies paid by the first defendant. The monies that was released by the plaintiff on 20 March 1997 cannot qualify as an reimbursement as the payment to the seller was only effected on 25 March 1997. Hence the transaction cannot be an equipment lease agreement though labeled as such.

4. By reason of my finding aforesaid to all intents and purposes the Equipment Lease Agreement was a loan on the security of the equipment and a bill of sale which by reason of it not being registered under the Bills of Sale Act 1950 makes the transaction void.

[5] As I have earlier stated to determine whether the transaction is a leasing agreement or otherwise it is necessary to look behind the Equipment Lease Agreement to discover its true nature and if the facts are not truly stated in the documents there are circumstances tending to show that the documents were a mere cloak – *Major Kassim Shariff v. Kwong Yik Finance Bhd.* [2001] 6 CLJ 397.

[6] Though the sum of RM2.3 million was paid to the seller nevertheless there was still a shortfall occasioned by the Ringgit/Pound ratio which had escalated from 3.8:1 to 7.5:1 during the 1997 recession which shortfall was provided by the plaintiff to the seller pursuant to a bank guarantee dated 15 August 1997 in the seller's favour. By the terms of the guarantee the plaintiff acknowledged that the agreement to purchase the Equipment was entered into by the first defendant and that the plaintiff guaranteed to pay the seller in the event the first defendant fails to make payment. The guarantee aforesaid reinforces the plaintiff's role as a financier to assist the first defendant to acquire the Equipment for its business.

[7] The plaintiff's reliance on the two English cases of *Stoneleigh Finance Ltd. v. Phillips & Ors* CA [1965] 1 All ER and *In Snook v. London & West Riding Investment Ltd.* CA [1967] 1 All ER cannot be supportive of the plaintiff's position as the facts therein revealed that the finance company had purchased the subject matter as at the date of the hire purchase agreement which was not the case here.

[8] Turning to the letter of guarantee dated 20 March 1997 there were 4 guarantors named but only 3 had signed it. The 4th guarantor named ie, one R. Gevage a/l Ramasamy, did not sign the guarantee although it had been witnessed by the plaintiff's officer Mohd. Farid A. Rahim. It is imperative to note that in the letter of offer dated 12 October 1996 the joint and several guarantee must be given by all the 4 named persons – see p. 19 Bundle C.

[9] In disputing liability counsel for the second, third and fourth defendants relied on s. 97 of the Contracts Act which provides "Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join". In the Court of Appeal decision *Len Min Kong v. United Malayan Banking Corporation Bhd. & Anor Appeal* [1998] 2 CLJ 879 s. 97 was discussed and Gopal Sri Ram JCA stated at p. 901:

> In our judgment, the following propositions may be culled from the authorities on the point under discussion:
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> 1) section 97 of the Contracts Act 1950 embodies the rule invented by the Court of Chancery to relieve sureties from the burden of their liability which, but for the operation of the rule, would be strict at common law.
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> 2) When interpreting section 97, guidance may reasonably be sought from cases decided in other jurisdictions which, while recognizing the existence of the rule, do not have any provision in their written law that is parallel to section 97 of our Act or section 144 of the Indian statute.
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> 3) The phrase "upon a contract" appearing in section 97 does not confine the parties to the contract of guarantee itself but includes an arrangement between them, collateral to the main contract, whereby it is contemplated that more than one person should execute the guarantee. In other words, a

> guarantor who invokes the benefit of the section is not confined to the four corners of the contract of guarantee when seeking to establish the existence of the contract of which the section speaks. He is at liberty to adduce evidence aliunde to demonstrate that there existed an arrangement between the parties that made his liability under the guarantee depend upon the execution of the guarantee by another guarantor.

[10] The factual matrix here to my mind establishes that there existed an arrangement between the parties that the liability under the guarantee of the guarantors depends on the execution of the guarantee by all 4 guarantors.

[11] This is evident by the fact that not only was the terms of the letter of offer expressly provides for the execution of the letter of guarantee by all the 4 persons named therein but the letter of guarantee also bears the name of R. Gerage a/l Ramasamy which execution column though not signed by him bears the signature of the witness of the plaintiff's officer one Mohd. Farid A. Rahim.

[12] I also wish to stress that the plaintiff had through their solicitor's letter of demand dated 14 May 1999 demanded payment from all 4 guarantors which goes to show that the liability of the guarantors depended on the due execution of all 4 guarantors – see pp. 110 to 112 Bundle C.

[13] To summarize the position it is my considered judgment that:

1) The property in or the ownership of the equipment remained with the 1st defendant at all material times. The property in the Equipment never passed to the plaintiff. See ss. 19 and 20 of the Sale of Goods Act 1957.

2) The purported lease agreement is a sham to cloak and disguise the money lending transaction. Since it was money lending transaction and the purported lease agreement had not complied with the Bills of Sale Act 1950, it is illegal and void for non-registration by virtue of s. 4 of this Act.

3) Since the loan and the guarantee was granted by the plaintiff without security it has also violated s. 60 of the Banking and Financial Institutions Act 1989.

A 4) By virtue of s. 24 of the Contracts Act 1950 the lease agreement is void because of non compliance of the Bills of Sale Act and BAFIA 1989.

5) Since the lease agreement itself is an illegal transaction then
B the letter of guarantee is also tainted by illegality and is thereby unenforceable. Alternatively the guarantee is also void by reason of s. 97 of the Contracts Act 1950 as the guarantee was only signed by 3 out of the 4 sureties who were supposed to have signed the surety.

C 6) The guarantee is also void by reason of uncertainty as the name of the lessee or the lease agreement was not stated in the guarantee and therefore there is no indication showing what the sureties were in fact guaranteeing.

D **[14]** By reason aforesaid the plaintiff's claim is hereby dismissed with costs.

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